IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROY S. DALE, KATIE P. KLEIN, DALE & KLEIN PARTNERSHIP, and K&R FAMILY LIMITED PARTNERSHIP Plaintiffs, V. CITIGROUP GLOBAL MARKETS, INC., SALOMON SMITH BARNEY, INC., CITIGROUP FUNDING, INC., CITIGROUP, INC., J. BRYAN REECE and MORGAN STANLEY SMITH BARNEY LLC Defendants.	§ § § § § § § § § § § § § § §	C.A. No. 4:12-cv-00494

DEFENDANTS' MOTION TO COMPEL MANDATORY ARBITRATION

Defendants Citigroup Global Markets, Inc., Salomon Smith Barney, Inc.,[1] Citigroup Funding, Inc. ("Citigroup Funding"), Citigroup, Inc., J. Bryan Reece[2] and Morgan Stanley Smith Barney LLC ("MSSB") (collectively "Defendants"), file this Motion to Compel Arbitration of all claims asserted by Plaintiffs Roy S. Dale, Katie P. Klein, Dale & Klein Family Partnership and K&R Family Limited Partnership (collectively, "Plaintiffs"), and to stay all further proceedings in this suit pending arbitration, pursuant to 9 U.S.C.A. §§ 3, 4.

I. PRELIMINARY STATEMENT

1. Plaintiff Dale & Klein Partnership, its alleged assignees, Plaintiffs Roy S. Dale and Katie P. Klein, and Plaintiff K&R Family Limited Partnership allege that they sustained losses on the

[1] In their Original Petition and First Amended Petition, Plaintiffs name Citigroup Global Markets, Inc. and Salomon Smith Barney, Inc. as two separate defendants. *See* Exs. D-1 & D-2 to Dkt. 1. However, these two names refer to the same entity: Citigroup Global Markets, Inc., formerly known as Salomon Smith Barney, Inc. Salomon Smith Barney Inc. changed its name to Citigroup Global Markets Inc. in or about April 2003. *See*, Exhibit A, Affidavit of Carolyn D. Dunbar and Exhibit B, Affidavit of Joseph B. Wollard. Citigroup Global Markets Inc. and Salomon Smith Barney Inc. will be referred to collectively as "CGMI."
[2] Defendants continue to assert that Defendant Reece was improperly joined as a Defendant in this matter and should be disregarded for purposes of establishing diversity jurisdiction.

purchases and sales of securities commonly known as ELKS and Pacers in brokerage accounts maintained at Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.) ("CGMI"). Plaintiffs bring this suit against CGMI, its affiliates, Citigroup Funding and Citigroup Inc., its former employee, J. Bryan Reece, and its successor, MSSB, to recover their alleged losses from the purchases and sales of those securities in their accounts at CGMI.

2. Plaintiffs' claims against all Defendants are subject to mandatory arbitration pursuant to the terms of written agreements entered into by Plaintiffs in connection with their accounts at CGMI and/or its predecessors. Thus, Plaintiffs agreed to pursue their claims, if any, against all Defendants ***only*** in arbitration. Plaintiffs' agreements to arbitrate are enforceable under Federal and state law, and both federal and state public policy strongly favor arbitration. Accordingly, Defendants request that this Court compel arbitration of all of Plaintiffs' claims against Defendants, and stay all further proceedings pending arbitration. *See* 9 U.S.C.A. §§ 3, 4.

II. STATEMENT OF FACTS

3. This dispute arises out of the purchase and sale of securities commonly known as ELKS and Pacers in brokerage accounts previously maintained by Plaintiffs Dale & Klein Partnership and the K&R Family Limited Partnership at CGMI and/or its predecessors (the "CGMI Accounts")[3]. Plaintiffs' Original and Amended Petitions (Dkt. 1, Exs. D-1 & D-2) admit that the Dale & Klein Partnership and the K&R Family Limited Partnership each maintained brokerage accounts with CGMI, and that the purchase and sale of securities at issue occurred in those accounts. *See*, Ex D-1, D-2 at §IV to Dkt. 1. In connection with opening the CGMI Accounts, Plaintiffs signed written agreements with CGMI and/or its predecessors, each of which contains an agreement to arbitrate any dispute between Plaintiffs and CGMI, its affiliates, employees,

[3] Plaintiffs transferred their accounts to UBS Financial Services in February 2009 when the Financial Advisor who serviced their accounts at CGMI, John Frakes, left CGMI and joined UBS. Mr. Frakes was the financial advisor for Plaintiffs' accounts at CGMI at the time of the purchases of the securities at issue.

predecessors and successors, concerning or arising out of: (i) the brokerage accounts maintained by the Plaintiffs at CGMI, its predecessors and/or successors; (ii) any transactions involving CGMI, its predecessors and/or successors; and (iii) the construction, performance or breach of any agreement between the Plaintiffs and CGMI, its predecessors and/or successors, and/or any duty arising from the business of CGMI, its predecessors and/or successors. True and correct copies of the Plaintiffs' these agreements are attached as Exhibits 1 through 4 to the Affidavit of Carolyn D. Dunbar, attached hereto as Exhibit "A"[4] ("Dunbar Affidavit") (collectively, the "Client Agreements").

4. The Dale & Klein Partnership Account was opened on or about November 9, 1989. A true and correct copy of the Client Agreement signed by Roy Dale and Katie Klein is attached as Exhibit 1 to the Dunbar Affidavit, Exhibit A. The Dale & Klein Partnership Account was originally opened at Shearson Lehman Hutton Inc. CGMI is the successor to Shearson Lehman Hutton Inc. Ex. A, Dunbar Affidavit, ¶3. The Client Agreement contain the following provision requiring mandatory arbitration:

> **23. ARBITRATION AND GOVERNING LAW.**
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> … Any controversy: (1) arising out of or relating to any of my accounts maintained individually or jointly with any other party, in any capacity, with you; or (2) relating to my transactions or accounts with any of your predecessor firms by merger, acquisition or other business combination from the inception of such accounts; or (3) with respect to transactions of any kind executed by, through or with you, your officers, directors, agents and/or employees; or (4) with respect to this agreement, or the breach thereof, shall be resolved by arbitration. . . .
>
> 25. BINDING EFFECT.
>
> This agreement and its terms shall be binding upon my heirs, executors, successors, administrators, assigns, committee and conservators ("successors"). … This agreement shall inure to the benefit of your assigns and successors, by merger, consolidation or otherwise (and you may transfer my accounts to any such successors and assigns).

[4] Personal, confidential and/or non-relevant information has been redacted from the Client Agreements.

See Exhibit 1 to Dunbar Affidavit, Exhibit A.

5. Approximately one (1) month later, on December 12, 1989, after Shearson Lehman Hutton Inc. had changed its name to Shearson Lehman Brothers Inc., the Dale & Klein Partnership signed an additional Client Agreement that also contained a provision requiring mandatory arbitration:

> **24. ARIBTRATION AND GOVERNING LAW.**
>
> **. . . Any controversy arising out of or relating to any of my accounts, to transactions with you, your officers, directors, agents or employees, or me, or to this agreement, or the breach thereof, or relating to transactions or accounts maintained by me with any of your predecessor firms by merger, acquisition or other business combination from the inception of such accounts, shall be settled by arbitration …**
>
> 26. BINDING EFFECT.
>
> This agreement and its terms shall be binding upon my heirs, executors, successors, administrators, assigns, committee and conservators ("successors"). This agreement shall inure to the benefit of your assigns and successors, by merger, consolidation or otherwise (and you may transfer my accounts to any such successors and assigns).

See Exhibit 2 to Dunbar Affidavit, Exhibit A; *see also*, Exhibit A, Dunbar Affidavit, ¶5.

6. Plaintiff K&R Family Limited Partnership opened a brokerage account with Salomon Smith Barney Inc. on or about November 8, 2002.[5] At or about that time, Roy Dale and Katie Klein signed a Client Agreement on behalf of the K&R Family Limited Partnership. A true and correct copy of that Client Agreement is attached as Exhibit 3 to Dunbar Affidavit, Exhibit A. The K&R Family Limited Partnership Client Agreement also contained the following mandatory arbitration provision:

[5] As stated above, CGMI and Salomon Smith Barney are the same entity. *See, supra* at FN 1.

> **6. ARBITRATION.**
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> **. . . I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SSB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SSB individually or jointly with others in any capacity; (ii) any transaction involving SSB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SSB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SSB is a member.**
>
> 7. The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SSB, and shall inure to the benefit of SSB's present organization, and any successor organization or assigns; and shall be binding upon my heirs, executors, administrators, assigns or successors in interest.

Exhibit 3 to Dunbar Affidavit, Exhibit A. SSB was defined in the Client Agreement as "Salomon Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors and assigns." *See id* at p. 3.

7. Plaintiff K&R Family Limited Partnership opened an additional account at CGMI on or about June 25, 2007. At or about that time, Roy Dale signed a Client Agreement on behalf The K&R Family Limited Partnership, a true and correct copy of which is attached as Exhibit 4 to the Dunbar Affidavit, Exhibit A. The 2007 K&R Family Limited Partnership Client Agreement contains the following mandatory arbitration provision:

> **6. ARBITRATION**
>
> **. . . I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of**

> **this or any other agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SB is a member.**
>
> 7. The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SB, and shall inure to the benefit of SB's present organization, and any successor organization or assigns; and shall be binding upon my heirs, executors, administrators, assigns or successors in interest.

Exhibit 4 to Dunbar Affidavit, Exhibit A. "SB" was defined as ". . . Citigroup Global Markets Inc., or its direct or indirect subsidiaries and affiliates or their successors or assigns." *See id.* at p. 3.

8. Thus, Plaintiffs Dale & Klein Partnership and the K&R Family Limited Partnership, and any assigns, agreed in writing on multiple occasions that any controversy between them and CGMI, its predecessors, affiliates and/or successors, concerning or arising from (i) any account maintained with CGMI, its predecessors, affiliates and/or successors, (ii) any transaction involving CGMI, its predecessors, affiliates and/or successors, and (iii) the construction performance or breach of this or any other agreement, or any duty arising from the business of CGMI, shall be determined **only by arbitration**. The existence of these written arbitration agreements cannot be disputed by Plaintiffs.

9. Moreover, the claims asserted by Plaintiffs in this suit against all Defendants plainly fall within the scope of one or more of the mandatory arbitration provisions set forth above. The facts, allegations and claims asserted by Plaintiffs are contained in a single paragraph within the Original and Amended Petitions. *See* Exs. D-1 & D-2 at § IV to Dkt. 1. Plaintiffs allege that securities called ELKS and Pacers were purportedly marketed to them as relatively safe securities, that these securities were in fact allegedly extremely risky, that the Plaintiffs were allegedly induced by misrepresentations and omissions to purchase ELKS and Pacers in their

accounts at CGMI and thereafter sustained significant losses. *See id.* Based on those allegations, Plaintiffs sue CGMI and Salomon Smith Barney Inc. for breach of contract, breach of fiduciary duty and fraud by misrepresentation and omission, and sue Defendants Citigroup Funding Inc., Citigroup Inc. and J. Bryan Reece for fraud, all in connection with the purchase and sale of ELKS and Pacers in their accounts at CGMI. *See id.* Defendant Morgan Stanley Smith Barney LLC is sued only as the successor to CGMI. *See id.* All of the Plaintiffs' alleged claims against all Defendants arise out of Plaintiffs' accounts with CGMI, transactions involving CGMI and/or its affiliates, or the alleged construction, performance or breach of agreements and/or alleged duties arising from the business at CGMI relating to Plaintiffs' accounts. As such, these allegations, although wholly denied by Defendants, fall squarely within the scope of the contractual arbitration agreements signed by Plaintiffs, and therefore must be arbitrated.

10. Notwithstanding Plaintiffs' agreement and obligation to arbitrate their claims, and in disregard of their contractual obligation, Plaintiffs seek to pursue their claims in court rather than arbitration. Defendants have made demand upon Plaintiffs to pursue their claims (if any) in arbitration, but Plaintiffs have wrongly refused to do so.

III. PLAINTIFFS' CLAIMS MUST BE COMPELLED TO ARBITRATION

11. Federal and sate law strongly favor arbitration. *See, e.g., In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011) (orig. proceeding) (citing *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996); *Moses H. Cohn Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Texas public policy provides for a presumption in favor of agreements to arbitrate under the Federal Arbitration Act ("FAA"). *See Rubiola*, 334 S.W.3d at 225. The Client Agreements in this case are contracts for the purpose of trading securities and thus involve commerce within the meaning of the FAA. *See Reynolds v. York*, No. H-03-1108, 2003 U.S. Dist. LEXIS 25321, *5 (S.D. Tex. Nov. 20, 2003) (mem. op.); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wilson*,

805 S.W.2d 38, 39 (Tex. App.—El Paso 1991, no writ). The Plaintiffs' Client Agreements with Defendants also fall within the Texas Arbitration Act ("TAA"), chapter 171 of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 171.001, *et. seq*.

12. Defendants deny the allegations asserted by the Plaintiffs in this lawsuit. However, the law requires that in determining whether or not arbitration is required pursuant to a written arbitration agreement, the court must consider a claimant's allegations as pleaded. *Jones v. Halliburton Co.*, 583 F.3d 228, 240 (5th Cir. 2009) (citing *Waste Mgmt., Inc. v. Residuos Industriales Mutiquin, S.A. de C.V.*, 372 F.3d 339, 344 (5th Cir. 2004) (courts focus on the "factual allegations in the complaint rather than the legal causes of action asserted" in determining whether a claim falls within the scope of an arbitration agreement)); *Prudential-Bache Securities Inc. v. Garza*, 848 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1993, orig. proceeding) (stating that whether a claim falls within the scope of an arbitration agreement "depends on the facts alleged in the complaint"); *Prudential Secs. Inc. v. Banales*, 860 S.W.2d 594, 597 (Tex. App.—Corpus Christi 1993, orig. proceeding) (stating that the court must compel arbitration when the claims raised fall within the scope of an arbitration agreement).

13. A party seeking to compel arbitration has the initial burden of showing the existence of a valid, enforceable arbitration agreement, and showing that the claims asserted fall within the scope of that agreement. *Safer v. Nelson Fin. Group*, 422 F.3d 289, 293 (5th Cir. 2005); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 572 (Tex. 1991). When a party presents evidence of an arbitration agreement, a presumption in favor of arbitration attaches. *See Safer*, 422 F.3d at 294.

14. Defendants have met their burden of showing the existence of multiple arbitration agreements. *See*, Exhibit A, Dunbar Affidavit; *see also* ¶¶ 3-6, *supra*. Further, the claims

Plaintiffs assert against all Defendants plainly fall squarely within the scope of the arbitration agreements contained in the Client Agreements signed by Plaintiffs.

- The Plaintiffs admit in their First Amended Petition that they maintained accounts at CGMI, and allege that they purchased investments known as ELKS and Pacers in those accounts and thereafter allegedly sustained huge losses. *See* Ex. D-2 at §IV to Dkt. 1 (Plaintiffs' State Court Amended Petition). As such, Plaintiffs' claims as pleaded directly concern accounts maintained by the Plaintiffs at CGMI, and are thus within the scope of all the arbitration agreements quoted above.

- The Plaintiffs claim that the Defendants allegedly marketed the ELKS and Pacers which Plaintiffs purchased in their accounts at CGMI as relatively safe securities when such securities were allegedly extremely risky. *See id.* Plaintiffs' claims as pleaded directly concern (i) accounts maintained by Plaintiffs at CGMI, and/or (ii) transactions involving CGMI and/or its affiliates. Accordingly, these claims are within the scope of the arbitration agreements set forth above.

- Plaintiffs claim that Citigroup Global Markets Inc./Salomon Smith Barney Inc. allegedly breached unspecified contracts and fiduciary duties in relation to the ELKS and Pacers purchased in Plaintiffs' accounts at CGMI. *See id.* As such, Plaintiffs' claims as pleaded directly concern (i) Plaintiffs' accounts maintained with CGMI, (ii) transactions involving CGMI and/or its affiliates, and/or (iii) the construction, performance or breach of an agreement between Plaintiffs and CGMI and/or the breach of any duty arising from the business of CGMI. Plaintiffs' claims are therefore within the scope of the arbitration agreements set forth above.

- Plaintiffs claim that all Defendants allegedly engaged in fraud by alleged misrepresentations and omissions in connection with the marketing of the ELKS and Pacers which the Plaintiffs purchased in their accounts at CGMI. *See id.* Plaintiffs' claims as pleaded directly concern (i) Plaintiffs' accounts maintained at CGMI, (ii) transactions involving CGMI, its affiliates and/or employees, and/or (iii) alleged duties arising from the business of CGMI and/or its affiliates. Thus, Plaintiffs' claims fall within the scope of the arbitration agreements quoted above.

- Plaintiffs admit in their Original and First Amended Petitions that MSSB is the successor to CGMI and is sued in that capacity. *See id.*; *see also*, Exhibit A, Dunbar Affidavit. Thus, Plaintiffs' claims against MSSB as pleaded are within the scope of the arbitration agreements set forth above as those agreements inure to the benefit of CGMI's successors.

- CGMI is the successor to Shearson Lehman Hutton Inc. and Shearson Lehman Brothers Inc. *See*, Exhibit A, Dunbar Affidavit.

- Plaintiffs Dale and Klein allege that they are the "assigns" of any claims asserted by the Dale and Klein Partnership "…to the extent that [any claims] are assignable …." *See* Exs D-1, D-2 at §IV to Dkt. 1. As such, the arbitration agreements set forth above are binding upon Plaintiffs Roy S. Dale and Katie P. Klein.

- Defendants Citigroup Funding and Citigroup Inc. are affiliates of CGMI, and the arbitration agreements cited above thus require arbitration of Plaintiffs' claims. *See* Exhibit B, Wollard Affidavit; *and see* Ex. 1, ¶ 25; Ex. 2, ¶ 26; Ex. 3, ¶ 7 & Ex. 4, ¶ 7 to Exhibit A, Dunbar Affidavit.

- Defendant Reece was an employee of CGMI and is currently employed by MSSB. Plaintiffs admit that Reece is sued in his role as branch manager at the CGMI branch where the Dale and Klein Partnership and K&R Family Limited Partnership accounts were maintained. *See* Ex. D-2 at §IV to Dkt. 1 (Plaintiffs' State Court Amended Petition); *see also* Exhibit A (Dunbar Affidavit); Plaintiffs' supposed claims against Reece thus fall within the scope of the arbitration agreements referenced above. *See* Ex. 1, ¶¶ 2,3; Ex. 2, ¶¶ 2,4; Ex. 3, ¶ 6 & Ex. 4, ¶ 6 to Exhibit A, Dunbar Affidavit.

- Plaintiffs agreed that the arbitration agreements applied to all accounts maintained by them at CGMI and/or its predecessors. *See* Ex 1, ¶¶ 23, 25; Ex. 2, ¶¶ 24, 26; Ex. 3, ¶¶ 6,7 & Ex. 4, ¶¶ 6,7 to Exhibit A, Dunbar Affidavit.

15. All of the Plaintiffs' claims are encompassed by and fall within the scope of the arbitration agreement between Defendants and the Plaintiffs. Once a party establishes that the claims asserted fall within the scope of an arbitration agreement, the court must compel arbitration "unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Safer*, 422 F.3d at 294 (citing *Personal Sec. & Safety sys., Inc. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2001)). Accordingly, Defendants have met their burden under the law. *Id.* Any doubt as to the arbitrability of a claim or controversy is to be resolved in favor of arbitration. *Id.* (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

16. Given that all of the claims asserted by the Plaintiffs against Defendants are subject to mandatory arbitration, this Court should stay all further proceedings in this cause as to

Defendants pending arbitration. *See Safer*, 422 F.3d at 298; *Shearson Lehman Bros., Inc. v. Kilgore*, 871 S.W.2d 925, 928 (Tex. App.—Corpus Christi 1994, orig. proceeding); *see also* 9 U.S.C.A. § 3.

WHEREFORE, PREMISES CONSIDERED, Defendants Citigroup Global Markets, Inc., Salomon Smith Barney, Inc., Citigroup Funding, Inc., Citigroup, Inc., J. Bryan Reece and Morgan Stanley Smith Barney LLC, respectfully pray that this Motion to Compel Mandatory Arbitration be granted, that all claims asserted by the Plaintiffs against Defendants be compelled to mandatory arbitration, and that all proceedings in this cause be stayed pending arbitration. Defendants further pray for all other relief to which they may be justly entitled.

Respectfully submitted,

/s/ Thomas D. Cordell

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CERTIFICATE OF CONFERENCE

I have conferred with William Mount, counsel for Plaintiffs, regarding Defendants' Motion to Compel Arbitration. Plaintiffs oppose Defendants' Motion to Compel Arbitration.

/s/ Thomas D. Cordell
Thomas D. Cordell

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served on the following attorney of record by U.S. mail, certified and return receipt requested in accordance with the Federal Rules of Civil Procedure on this 27th day of February, 2012.

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/s/ Thomas D. Cordell
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